UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THOMAS E. MORGAN	CASE NO. 97-62426
DANIEL E. KINNEY	97-61897
CHERYL A. SARDELLA	97-62104
SANDRA L. VELARDI	97-61928
PETER MATUSICK AND ANGEL S. MATUSICK	97-62596
PATRICIA A. WRIGHT	97-61698
MARGARET A. WANDS	97-62869

Debtors

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court are seven motions filed by the United States Trustee ("UST") in seven unrelated bankruptcy cases requesting that the Court review fees paid to James F. Selbach, Esq. ("Selbach"), in connection with the preparation of bankruptcy petitions in those

cases.[1] The UST requests that the Court order the disgorgement of such fees for failure to comply with section 329(a) of the Bankruptcy Code (11 U.S.C. § 101-1330) ("Code"), Rule 2016(b) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P") and Rule 910.3 of the Local Rules of Bankruptcy Procedure for the Northern District of New York ("Local Rules"). Argument on these motions was heard by the Court on July 22, 1997, and thereafter on August 12, 1997. The matters were submitted for decision on August 12, 1997.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(O).

FACTS AND ARGUMENTS

Each of the Debtors in these cases filed a chapter 7 bankruptcy petition, and in connection therewith paid Selbach a fee of $295 for services relating to the preparation of the petition and schedules and for phone consultation during the pendency of their cases. All of the debtors appeared *pro se* at their respective Code § 341(a) meeting of creditors, however. Other than in

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[1]The UST's motions in all seven cases raise the same issues and seek similar relief. Based on the foregoing, the Court consolidated the seven motions for the purpose of argument, and this Decision addresses the UST's motions in the following cases: *In re Daniel E. Kinney*, case no. 97-61897; *In re Margaret A. Wands*, case no. 97-62869; *In re Thomas E. Morgan*, case no. 97-62426; *In re Cheryl A Sardella*, case no. 97-62104; *In re Sandra A. Velardi*, case no. 97-61928; *In re Peter Matusick and Angel S. Matusick*, case no 97-62596; and *In re Patricia A. Wright*, case no. 97-61698.

the statements of financial affairs, Selbach's name does not appear anywhere in the petitions. No statements were filed by Selbach regarding the compensation received from the debtors.

The UST contends that the legal fees received in connection with each of these cases should be disgorged as a result of Selbach's failure to comply with the disclosure requirements of Code § 329(a) and Fed.R.Bankr.P. 2016(b), which require that a statement of compensation paid or agreed to be paid be filed with the court within fifteen days after the order for relief. Selbach argues that disclosure under Code § 329(a) is only required by attorneys who are "representing" a debtor, and that in these cases, he was not representing the debtors but rather was providing certain limited legal services and advising the debtors on legal issues in connection with their individual bankruptcy cases. Selbach further argues that there was disclosure to the Court since in the debtors' statements of financial affairs there is a description of the services rendered by him.

DISCUSSION

Pursuant to Code § 329(a), any attorney representing a debtor in a case under title 11 of the United States Code, or in connection with such a case, must file with the court a statement of the compensation paid or agreed to be paid, for services rendered or to be rendered in contemplation of or in connection with the case, including the source of such compensation, regardless of whether or not the attorney applies for compensation under title 11. *See* 11 U.S.C. § 329(a); *see also In re Hunt*, 59 B.R. 842, 844 (Bankr. N.D.Ohio 1986). This section protects the debtor and the creditors from overreaching by an attorney, *see, e.g., Burd v. Walters (In re*

Walters), 868 F.2d 665, 668 (4th Cir. 1989), and establishes a statutorily mandated and essential process designed to insure that only reasonable, necessary, and beneficial services and fees are charged to a prospective or prepetition debtor in bankruptcy. *See Yellow Cab Coop. Ass'n v. Mathis (In re Yellow Cab Coop. Ass'n)*, 185 B.R. 844, 850 (Bankr. D.Colo. 1995). If the disclosure requirements reveal compensation which exceeds the reasonable value of the services rendered, the court may deny compensation or order the return of the amount deemed to be excessive. *See* 11 U.S.C. § 329(b).

Fed.R.Bankr.P. 2016(b) implements Code § 329 by requiring that the attorney file with the court and transmit to the UST the statement required by Code § 329 within fifteen days after the order for relief, or at another time as directed by the court. The function of Fed.R.Bankr.P. 2016(b) is to give the UST, as well as other interested parties, the information needed to determine whether to request relief from the court on the basis of excessive fees charged to the debtor. *See In re Mills*, 170 B.R. 404, 409 (Bankr. D.Ariz. 1994). The disclosure requirements of Code § 329 and Fed.R.Bankr.P. 2016(b) are "central to the integrity of the bankruptcy process and are [sic] not to be taken lightly nor easily dismissed . . . ." *In re TJN, Inc.*, 194 B.R. 400, 403 (Bankr. D.S.C. 1996).

In these cases, Selbach has asserted two primary arguments in support of his contention that Code § 329 statements of disclosure were not necessary: 1) that he was not "representing" the Debtors and therefore did not fall within the language of Code § 329; and 2) that there was sufficient disclosure since the statements of financial affairs filed in the cases contain substantially the same information as is required by Code § 329 and Fed.R.Bankr.P. 2016(b).

Selbach contends that by limiting the services he provides to the debtors to preparing the

bankruptcy petitions and furnishing legal advice to them throughout their cases, he is not "representing" the debtors, which he asserts would involve, for example, appearing with the debtors in court, at a meeting of creditors, or representing the debtors as to third parties. Selbach argues that his primary objection to filing a Fed.R.Bankr.P. 2016(b) statement is that by doing so he would become the attorney of record for the debtors, thus obligating him to, *inter alia*, appear at the creditors' meetings and respond to motions pursuant to Local Rule 910.3.[2] This he asserts would effectively nullify his attempts to limit the scope of his retention solely to preparation of the petition and the provision of legal advice.

In New York, the term "practice of law" includes the preparation of all types of legal instruments, the rendering of advice to clients and all actions taken on their behalf in connection with the law. *See Erbacci, Cerone, and Moriarity, Ltd. v. United States*, 923 F.Supp. 482, 485 (S.D.N.Y. 1996); *El Gamayel v. Seaman*, 72 N.Y.2d 701, 706, 533 N.E.2d 245, 536 N.Y.S.2d 406 (Ct. App. 1988). In the past, the reporting requirements of Code § 329, applicable to attorneys, have even been found to be applicable to persons practicing law who are unauthorized to do so. *See Goudie v. Morrow (In re Telford)*, 36 B.R. 92, 94 (B.A.P. 9th Cir. 1984); *Michel v. Larson (In re Webster)*, 120 B.R. 111, 114 (Bankr. E.D.Wis. 1990). Services for which non-attorneys have been charged with reporting pursuant to Code § 329 include interviewing, soliciting information, advising a debtor and preparing bankruptcy schedules. *See Glad v. Mork*

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[2] Local Rule 910.3(a) reads as follows:

> Required Representation. An attorney for debtor is required to represent the debtor in all matters related to the bankruptcy case including, but not limited to, the defense of adversary proceedings commenced pursuant to 11 U.S.C. §§ 523 and 727 unless other counsel is substituted at the request of the debtor or the attorney is permitted to withdraw by order of the court.

(In re Glad), 98 B.R. 976, 978 (B.A.P. 9th Cir. 1989); *In re Anderson*, 79 B.R. 482, 485 (Bankr. S.D.Cal. 1987). Thus, if the party engaged in rendering legal services to a debtor, that party, whether an attorney or not, was subject to the requirements of Code § 329and Fed.R.Bankr.P. 2016(b).[3]

Selbach attempts to avoid the requirements of the above provisions by asserting that his services do not rise to the level of "representation." However, it is clear that the practice of law, which includes advising debtors and preparing documents for filing, requires compliance with those provisions. In a recent decision, the Ninth Circuit Bankruptcy Appellate Panel affirmed a decision of the bankruptcy court which denied fees to an attorney who prepared bankruptcy petitions, schedules and statements of affairs in two separate cases but failed to comply with Fed.R.Bankr.P. 2016(b). *See Hale v. United States Trustee (In re Basham)*, 208 B.R. 926 (B.A.P. 9th Cir. 1997). Compensation disclosure statements in those cases were eventually filed two and four months after the petitions had been filed, in violation of the fifteen-day limitation imposed by Fed.R.Bankr.P. 2016(b). In the proceedings in the bankruptcy court below, the attorney argued that he fully disclosed his fees by listing them in the statement of affairs of each debtor, and that such disclosure was sufficient. However, "[t]he disclosure requirements imposed by

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[3] In the 1994 amendments to the Code, *see* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 1994 U.S.C.C.A.N. (108 Stat. 4106) 3340, Congress added section 110 to establish standards and penalties pertaining to bankruptcy petition preparers. *See* 11 U.S.C. § 110. A "bankruptcy petition preparer" is a "person, *other than an attorney* or an employee of an attorney, who prepares for compensation a document for filing," which includes a petition or any other document prepared for filing by a debtor in connection with a bankruptcy case. *See* 11 U.S.C. § 110(a) (emphasis added). Pursuant to Code § 110(h)(1), a bankruptcy petition preparer must also disclose any fee received from of on behalf of the debtor. As an attorney, Selbach is expressly excluded by definition from being a bankruptcy petition preparer as that term is defined in the Code. Instead, his actions are addressed by Code § 329 and Fed.R.Bankr.P. 2016(b).

§329 are mandatory, not permissive, and an attorney who fails to comply with the disclosure requirements forfeits any right to receive compensation." *Basham*, 208 B.R. at 931; *see In re Investment Bankers, Inc.*, 4 F.3d 1556, 1565 (10th Cir. 1993), *cert. denied*, 510 U.S. 1114, 114 S.Ct. 1061, 127 L.Ed.2d 381 (1994). Based on the attorney's non-compliance with Code § 329 and Fed.R.Bankr.P. 2016(b), the Bankruptcy Appellate Panel held that the bankruptcy court was authorized to compel disgorgement of all of the attorney's fees. *See Basham*, 208 B.R. at 931. As noted by the court in *Basham*, by allowing the debtors to represent themselves after initially representing them,[4] the attorney

> created a situation where he would have no responsibility for the outcome of their cases but could still receive compensation for his services without the bankruptcy court's knowledge. This is exactly the type of abuse the Code addresses by requiring the filing of a compensation disclosure statement pursuant to Rule 2016(b).

Basham, 208 B.R. at 933 (footnote omitted).[5]

The Court is not persuaded by Selbach's argument that his fees and services were sufficiently disclosed based on the fact that essentially the same information as required by Code § 329 is found in the debtors' statements of affairs. Such disclosure does not meet the

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[4] The attorney in Basham stated that his services involved solely financial counseling and preparation of the petitions, schedules and statements of affairs, and that he did not represent the debtors at the Code § 341(a) meetings of creditors because they did not pay an additional fee for his appearance. *See Basham*, 208 B.R. at 932. It is apparent that the Bankruptcy Appellate Panel concluded that advising debtors and preparing their petitions, schedules and statements of affairs constitutes "representation" of the debtors.

[5] The bankruptcy court also expressed concern regarding the practice of assisting debtors with their petitions and then leaving them to represent themselves. The bankruptcy court's opinion was that the attorney had an obligation to either handle the cases from start to finish for what the debtor could afford to pay, or to refer the cases to another attorney.

requirements of Code § 329 and Fed.R.Bankr.P. 2016(b). *See Basham*, 208 B.R. at 931. It is improper for an attorney to rely on other documents filed in a case as a substitute for compliance with those provisions. *See In re TJN, Inc.*, 194 B.R. 400, 402-03 (Bankr. D.S.C. 1996); *In re Quality Respiratory Care, Inc.*, 157 B.R. 180, 181 (Bankr. D.Me. 1993).

Non-compliance with Code § 329 and Fed.R.Bankr.P. 2016(b), even if unintentional or inadvertent, supports total denial of fees. *See In re Vann*, 136 B.R. 863, 873 (D.Colo. 1992), *aff'd*, 986 F.2d 1431 (10th Cir. 1993); *Basham*, 208 B.R. at 931. A court can *sua sponte* order an attorney to disgorge fees already paid to the attorney, since by violating Code § 329 an attorney forfeits the right to fees received. *See Investment Bankers*, 4 F.3d at 1565-66. In this case, Selbach asserted that he believed based on his review of the law that he was not required to file a statement of disclosure pursuant to Code § 329. Selbach also asserted that when confronted by the UST regarding his failure to do so, he attempted to work with the UST to create a modified disclosure statement which would allow him to continue limiting the scope of his employment in cases such as those presented here. Although the UST was more concerned with the issues presented by Selbach's actions than with complete disgorgement of fees paid, the UST was wary that any remedy short of disgorgement might give the indication that the Court condoned the practice of not filing disclosure statements.

While the Court does not accept the position taken by Selbach, complete disgorgement in this case is unwarranted. Selbach made a good faith attempt to comply with the law and attempted to remedy the problems brought to his attention by the UST. Nonetheless, whether inadvertent or unintentional, non-compliance with Code § 329 and Fed.R.Bankr.P. 2016(b) supports a denial of fees. The Court shall allow a total of $700 of the fees paid to Selbach in

these cases, and the remaining $1,365 shall be disgorged. This disallowance is based on non-compliance with the fee disclosure requirements and because the Court finds that $295 to prepare bankruptcy petitions is excessive. There was no evidence submitted by Selbach to indicate that he engaged in rendering extensive legal advice to the debtors which might justify the higher fees.

Based on the foregoing, it is

ORDERED that Selbach is to disgorge a total of $1,365 in fees received in the seven cases which are the subject of this Decision (*see* footnote 1), which shall be distributed equally among the seven bankruptcy estates[6]; and it is further

ORDERED that Selbach shall comply with Code § 329 and Fed.R.Bankr.P. 2016(b) in all future similar cases.

Dated at Utica, New York

this 17th day of October 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[6] These monies shall be returned to the estates without prejudice to the debtors to argue that the money is not property of the estate, and therefore should be returned to the entity making the payment. *See* 11 U.S.C. § 329(b).